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No. 84-1715
No. 84-1759

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CITY OF LAWTON, OKLAHOMA, et al.,
Petitioners,

V.

SOLOMON LUSBY, et al.,
Respondents.

T.G.&Y. STORES, INC.,
Petitioner,

V.

SOLOMON LUSBY, VAUGHN LUSBY
and ALVIN JERARD LUSBY,
Respondents.

REPLY TO RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PAGE DOBSON and
MICHAEL W. HINKLE
Counsel of Record
JOHN R. DENNENY
HOLLOWAY, DOBSON,
HUDSON & BACHMAN
1100 Continental Savings
Building
101 Park Avenue
Oklahoma City, OK 73102
Telephone: (405) 235-8593

Counsel for Petitioner

September, 1985

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INTRODUCTION

COMES NOW the Petitioner, T.G.&Y. Stores, Inc., and pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States, hereby files this Reply Brief addressed to the arguments raised in the Brief in Opposition filed by the Respondents. As this Court will

recall, two separate Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit have been filed in this consolidated matter. In the Respondents' Consolidated Brief in Opposition to the Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit the Respondents devote slightly over three (3) pages to the issues and arguments raised in this Petitioner's Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. However, in these three pages the Respondents make statements to which this Petitioner feels compelled to respond.

ARGUMENTS OF THE RESPONDENTS

A. The Effect of the Submission of Claims under 42 U.S.C. §1983.

Initially, the Respondents urge that because the jury found liability on various pendent state claims the result in this case would be the same, even if this Court should question whether the liability under 42 U.S.C. §1983 was appropriate. This statement fails to take into account the fact that the verdict forms used by the Court did not require the jury to separate damages on the particular claims except among actual, nominal and punitive damages. Thus, although the jury found in favor of the Respondents on various pendent state claims, it is impossible to determine the amount of actual damages which would have been awarded against this Petitioner had the §1983 claims not been placed before the jury. This very matter has previously been briefed and the Petitioner would refer this Court to Proposition II(A) of the Reply Brief of Appellants, T.G.&Y. Stores, Inc. and Charles Gent, filed in the United States Court of Appeals for the Tenth Circuit on May 9, 1983. Of course, the Petitioner has at all times taken the position that the §1983 claims were inappropriately placed in this lawsuit, and

thus, the District Court for the Western District of Oklahoma should not have continued to hear the pendent state claims.

In this connection, another factor which must be considered involves the finding of the United States Court of Appeals for the Tenth Circuit that the trial court erred in instructing the jury on future medical expenses. More specifically, the Tenth Circuit found that the Respondents did not present specific evidence suggesting they would require future medical treatment, and thus, it could not be concluded with reasonable certainty that any of the Respondents would require future medical care. The Tenth Circuit found that it was error for the trial judge to have instructed the jury about such future medical expenses, but concluded that it was harmless error that did not affect the jury's determination of damages. The Petitioner strongly asserts that the erroneous instructions regarding damages, when considered in conjunction with the trial court's error in submitting the §1983 claims to the jury, created an atmosphere wherein this Petitioner was deprived of a fair trial on all matters submitted to the jury.

One final consideration with regard to the effect of the §1983 claim is that concerning the large amount of attorneys' fees awarded by the trial court in this action. In Appendix C attached to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by this Petitioner, this Court will find a reproduction of the judgment entered by the trial court in this matter. This judgment provides that the amount of $53,665.00 was awarded as reasonable attorneys' fees, said amount being awarded pursuant to 42 U.S.C. §1988 and to be paid by this Petitioner. Although the Respondents asserted claims under 42 U.S.C. §1985(3) and 42 U.S.C. §1986, the jury found in favor of this Petitioner on each of those claims. Thus, in the

absence of the finding of liability under §1983, the trial court would have had no basis for the awarding of attorneys' fees in this matter.

The Petitioner strongly urges that the Respondents' argument that the result in this case would have been the same even without the §1983 claims being placed before the jury is totally erroneous. The Petitioner states that the §1983 claim strongly influenced the amount of actual and punitive damages awarded against it. Further, there can be no question that the finding of liability on the §1983 claim established an otherwise nonexistent basis for the awarding of attorneys' fees, said award exceeding the amount of actual damages awarded against this Petitioner by almost $30,000.00.

B. Application of the Issues Presented

The Respondents next argue that the issues presented by this Petitioner are wholly factual and present no novel question or conflict of law. The Respondents initially argue that this Petitioner does not challenge the trial and appellate courts' findings that its employee, Charles Gent, acted under color of law. The Petitioner is uncertain why Respondents have made this statement, as all courts involved in this case have previously and correctly recognized that there can be no liability on the part of this Petitioner based upon a respondeat superior theory. (Instruction No. 14 and p. 13a of Appendix A to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit). In any event, Rule 19.6 of the Rules of the Supreme Court of the United States clearly will make Charles Gent a party herein should this Court grant the Petition for Writ of Certiorari. At that time, it will be appropriate to raise any challenge to the trial and appellate courts' finding that Charles Gent acted under color of law. It should be noted that Charles Gent has previously raised questions regarding the appropriateness of the finding of liability

as to him, particularly directed to whether he was entitled to a good faith defense instruction. Thus, Charles Gent supports the position of the Petitioners herein in favor of granting the Petition for Writ of Certiorari.

The Respondents argue that the only issue raised by the Petition for Writ of Certiorari is limited to the facts established by the evidence in this case. As a result, the Respondents state that because the determination of the question presented depends on the unique facts occurring in conjunction with this incident, there is no question of law which would impact on future litigants worthy of merit by this Court. Of course, the only issue presented in each and every case before this Court is to some degree based upon the particular facts and circumstances existing in that case. However, this does not preclude the applicability of this Court's decision to numerous other cases. As the Petitioner has previously asserted, the issues before this Court are of concern to every private individual and entity in the United States. The decision reached by the United States District Court for the Western District of Oklahoma, and the United States Court of Appeals for the Tenth Circuit, has created a situation in which each private individual and entity is potentially liable under the provisions of 42 U.S.C. §1983 even though that private individual or entity does not act in concert with a state entity or under color of law. Therefore, the scope of the protections of 42 U.S.C. §1983, and its application to the conduct of private individuals or entities, are involved in this Petition for Writ of Certiorari. Accordingly, the questions of law presented herein are extremely important to a wide variety of future litigants in every court faced with similar questions.

C. The Evidence

The Petitioner has never ignored the evidence presented at the trial court level, and presents this case in the posture of the findings of the Tenth Circuit for the

convenience of this Court in its determination of whether to grant the Petition for Writ of Certiorari. The Petitioner strongly disagrees with any suggestion that there was substantial and competent evidence presented at the trial court level justifying the finding that this Petitioner acted under "color of law". This Court has been presented with totally diverse opinions as to whether the evidence presented justifies any finding of liability on the part of this Petitioner under 42 U.S.C. §1983. The only method by which this conflict can finally be resolved is for this Court to review the trial court record.

In reviewing the summary of the evidence contained on p. 19 of the Respondents' Consolidated Brief, the Petitioner strongly asserts that the evidence contained in that summary is not sufficient to invoke the provisions of §1983. Even if each and every statement contained therein is accepted as true, those statements do not establish a sufficient basis for finding that this Petitioner acted under "color of law". This Petitioner reurges that there was no evidence presented in the trial of this action establishing any willful participation in a joint activity with the City of Lawton, and there was no evidence presented establishing that the Petitioner had any knowledge of the policies and customs of the City of Lawton.

It is somewhat incredible that the Respondents argue that the Petitioner created a scenario in which it had the authority to bring its own criminal charges by initiating a citizen's complaint because it knew that the City of Lawton would not exercise any check on such charges. Such an allegation is totally unsupported by the evidence in this case, which demonstrated at most the mere filing of a citizen's complaint by a private individual or entity by the use of the exclusive method presented by the City of Lawton. Although the Respondents attempt to use the off-duty status of Charles Gent in

establishing the "color of law" requirement, this device has previously been correctly rejected by both the United States District Court for the Western District of Oklahoma and the United States Court of Appeals for the Tenth Circuit.

D. The Appellate Court Opinion

The Petitioner disagrees with the Respondents reading of the appellate court opinion herein. While the Respondents urge that the demand of a release of civil liability was one of the acts which caused the violation of their constitutional rights, and that somehow the alleged abuse of the statute can be separated as a basis for liability from a basis for "color of law", the Petitioner disagrees. In its opinion, the Tenth Circuit necessarily must have found that the Petitioner was acting under color of law when it failed to dismiss the charges; otherwise, there could have been no finding of liability for those acts.

The question that must be determined is whether the Tenth Circuit found that the Petitioner had continuously acted under "color of law" from the moment of the filing of the citizen's charges, or, alternatively, whether the Petitioner acted under "color of law" at the time of filing the charges, and subsequently acted under "color of law" at a separate point in time when it allegedly used the charges as a "bargaining chip" in exchange for the release of civil liability. There can be no doubt that the Tenth Circuit did conclude that the Petitioner acted under color of law when bargaining for the release of the civil liability. Accordingly, the Petitioner believes that it appropriately presented its second question as being whether action under color of state law is present under §1983 when a private merchantile establishment seeks to obtain a release for all civil liability from a suspected shoplifter in exchange for the dismissal of all criminal charges brought by way of a citizen's complaint.

RECENT DECISION OF IMPORTANCE

One final matter that must be brought to this Court's attention concerns its recent decision in the case of *City of Oklahoma City v. Tuttle*, Case No. 83-1919. This matter was before the Court on a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Certiorari was granted because of the Court of Appeals' holding that proof of a single incident of unconstitutional activity by a police officer could suffice to establish municipal liability. In this Court's decision it reviewed the trial court's instruction on municipal liability which included language that "... but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." After considering the applicability of §1983 to the facts of that case, this Court concluded, at p.12 of the slip opinion:

> ...But unfortunately for respondent, the instruction given by the District Court allowed the jury to impose liability on the basis as such a single incident without the benefit of the additional evidence ...
>
> ... We think this inference unwarranted; first, in its assumption that the act at issue arose from inadequate training, and second, in its further assumption concerning the state of mind of the municipal policymakers. But more importantly, the inference allows a §1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker. The foregoing discussion of the origins of *Monell's* "policy or custom" requirement should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability

> under circumstances where no wrong could be ascribed to municipal decisionmakers. Presumably, here the jury could draw the stated inference even in the face of uncontradicted evidence that the municipality scrutinized each police applicant and met the highest training standards imaginable. To impose liability under those circumstances would be to impose it simply because the municipality hired one "bad apple".

The Court further concluded, at p. 15:

> . . . Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise, the existence of the unconstitutional policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation. Upon the charge upheld by the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed a non-policymaking officer who violated the Constitution. The decision of the Court of Appeals is accordingly *Reversed*.

The Petitioner believes that this Court should be informed that the identical language found to be lacking in *Tuttle* was contained in the instruction given to the jury in the case at bar. (Instruction No. 15). In light of the reversible nature of such an instruction the Petitioner

would respectfully suggest that this Court might consider remanding this case to the United States Court of Appeals for the Tenth Circuit with directions to reconsider its opinion.

For all of the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

PAGE DOBSON and MICHAEL W. HINKLE
Counsel of Record
JOHN R. DENNENY for the firm
HOLLOWAY, DOBSON, HUDSON
& BACHMAN
1100 Continental Savings Building
101 Park Avenue
Oklahoma City, OK 73102
(405) 235-8593

By:

MICHAEL W. HINKLE
Counsel for Petitioner

September, 1985

CERTIFICATE OF SERVICE

I, Michael W. Hinkle, a member of the Bar of the Supreme Court of the United States and counsel of record for T.G.&Y. Stores, Inc., Petitioner herein, hereby certify that on August 30, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Reply to Respondents' Consolidated Brief in Opposition to the Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit on each of the parties herein, as follows:

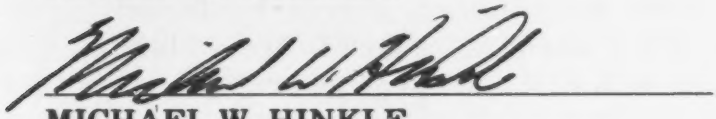
On Solomon Lusby, Vaughn Lusby and Alvin Jerard Lusby, Respondents herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Jack L. Kinzie and Gretchen A. Harris, and to Linda G. Scoggins, the above named Respondents' counsel of record, at Andrews, Davis, Legg, Bixler, Milsten and Murrah, 500 West Main Street, Oklahoma City, Oklahoma 73102.

On the City of Lawton, Oklahoma, a separate Petitioner herein, by depositing such copies in the United States Post Office, Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the Post Office address of Russell D. Bennett, the above named Petitioners' counsel of record, at 103 S.W. 4th Street, Lawton, Oklahoma, 73501.

All parties required to be served have been served.

Dated September 3, 1985.

PAGE DOBSON and MICHAEL W. HINKLE
Counsel of Record
JOHN R. DENNENY
HOLLOWAY, DOBSON, HUDSON
& BACHMAN
1100 Continental Savings Building
101 Park Avenue
Oklahoma City, Oklahoma 73102
(405) 235-8593
Counsel for Petitioner



MICHAEL W. HINKLE